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No. 87-6700

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN H. SELVAGE

Petitioner,

VS.

**JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS**

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF OF HARVEY EARVIN AS AMICUS CURIAE

In Support of Petitioner, John H. Selvage

==========

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INTEREST OF AMICUS

The interest of amicus is fully described in the text of the brief below.

SUMMARY OF ARGUMENT

Mr. Selvage is entitled to federal court review on the merits of his Franklin/Penry claims. The procedural bar

applied by the Texas Court of Criminal Appeals in his case is not supported by an adequate and independent state ground. Consequently, the finding of waiver is due no deference in federal court.

This result arises from considerations of well-settled state law.[1] First, in every reported decision save one, the Texas Court of Criminal Appeals has ignored the absence of a contemporaneous objection at trial and has reviewed unpreserved Franklin/Penry claims on the merits. The bar applied to Selvage is therefore an anomaly and not an adequate state ground for the decision. See Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 575, 585 (1988); Section I, infra.

Second, the settled Texas procedural

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[1] The application of these principles to unpreserved Penry claims is currently pending before the Texas Court of Criminal Appeals in Amicus' case. Ex Parte Earvin, No. 70,886.

rule requires a review on the merits of any claim, even though not previously preserved, where the claim asserts a right that is "fundamental," Sosa v. State, 769 S.W.2d 909, 916 (Tex. Crim. App. 1989) or a "right not recognized at the time of trial." Ex Parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984). Both factors apply to Mr. Selvage's Franklin/Penry claims. See Section II, infra.

Third and finally, the application of a state procedural bar to claims based on this Court's decisions in Franklin and Penry is not an "independent" state ground. Instead, "the resolution of the state procedural question depends on a federal constitutional ruling." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). The inquiries mandated under Texas procedural law -- i.e. whether the Penry error is fundamental under state law, and whether the Penry claim was recognized at the time of trial --

necessarily requires the Texas Court to determine the merits of the federal claim. Where, as here, the substantive claim is based on federal constitutional principles, the state procedural rule "depends on the court's federal ruling and consequently does not present an independent state ground for the decision rendered." Ake v. Oklahoma, supra at 75. See Section III, infra.

Each of these reasons, standing alone, precludes this Court from honoring the procedural bar asserted by the state with respect to Mr. Selvage's Franklin/Penry claims.

Amicus' case is pending before the Texas Court of Criminal Appeals. He is raising in the Texas Court these important issues of state law, and provides this brief as Amicus Curiae to aid this Court in its resolution of similar issues in Mr. Selvage's case.

I. IN THE GREAT MAJORITY OF REPORTED DECISIONS, THE TEXAS COURT HAS REVIEWED UNPRESERVED PENRY CLAIMS ON THE MERITS

The Texas Court of Criminal Appeals has ruled on the merits in the overwhelming majority of unpreserved Penry claims that have come before it. See e.g., Motley v. State, 773 S.W.2d 283, 286 (Tex. Crim. App. 1989); Perillo v. State, 758 S.W.2d 567, 577 (Tex. Crim. App. 1988); Wilkerson v. State, 726 S.W.2d 542, 547-48 (Tex. Crim. App. 1989); Clark v. State, 717 S.W.2d 910, 920 (Tex. Crim. App. 1986); Johnson v. State, 691 S.W.2d 619, 625-26 (Tex. Crim. App. 1984); Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984); Williams v. State, 674 S.W.2d 315, 321 (Tex. Crim. App. 1984); Adams v. State, 577 S.W.2d 717, 729-31 (Tex. Crim. App. 1979); Ex Parte Granviel, 561 S.W.2d 503, 516 (Tex. Crim. App. 1978). In only one reported decision has the Texas Court held

that an unpreserved Franklin/Penry claim was waived. See Fierro v. State, 706 S.W.2d 310, 318 (Tex. Crim. App. 1986). Moreover, in that case, the procedural ruling was an alternative holding; the Court also reviewed the claim on the merits.

This abundance of state authority flatly contradicting the holding in Selvage makes clear that the Selvage finding of waiver is not the "firmly established and regularly followed state practice that can prevent the implementation of federal constitutional rights." James v. Kentucky, 466 U.S. 341, 348-49 (1984); see also Johnson v. Mississippi, supra, at 585. In fact, the Selvage holding is directly contrary to the established practice. Therefore, under settled federal law,[2] Mr.

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[2] "[T]he question of when and how defaults in compliance with state procedural rules can preclude our consideration of a (continued...)

Selvage's claim under Franklin and Penry is not procedurally barred from review on the merits in federal court.

The Texas Court of Criminal Appeals' decision in Clark v. State, 717 S.W.2d 910 (Tex. Crim. App. 1986), is representative of the treatment given by the court to these unpreserved Penry claims. In Clark, appellant argued that the special issues of the Texas capital sentencing statute violated the Eighth Amendment by:

> [failing to] provide adequate procedural safeguards by merely permitting the defendant to present all relevant mitigating factors at the punishment stage of the trial, without insuring the jury, under appropriate instructions from the trial court, consider and weigh these mitigating factors in answering the punishment questions.

Id. at 920. The court's decision makes

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[2](...continued)
federal question is itself a federal question." Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. ___, 100 L.Ed.2d 575, 585 (1988), quoting Henry v. Mississippi, 379 U.S. 443, 447 (1965).

clear that the issue was not preserved at trial: "[t]he record reflects that the appellant did not object to the charge on punishment, nor did he submit any requested instructions." Id. Nevertheless, the court's ruling rejected the claim (pre-Penry) on the merits.[3]

Similarly, in Williams v. State, 674 S.W.2d 315 (Tex. Crim. App. 1984), the appellant argued several grounds of error raising the problems ultimately confronting this Court in Penry. There the appellant argued that the first special issue precluded "proper consideration of mitigating circumstances." Id. at 320-21.

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[3] "A majority of this Court has long held that it is not error, constitutional or otherwise, not to instruct the jury as the appellant suggests, and to repeat here what has been stated on the issue would simply unnecessarily elongate this opinion, which we decline to do." Clark v. State, 717 S.W.2d 910, 920 (Tex. Crim. App. 1986) collecting cases, including Penry v. State, 691 S.W.2d 636 (Tex. Crim. App. 1985) and Jurek v. Texas, 428 U.S. 262 (1976).

Appellant also urged the Court of Criminal Appeals "to provide guidance to trial courts and juries by providing some working definition of 'deliberate'." Id. at 321. He also argued that the third special issue improperly allowed the state to use mitigating evidence in aggravation of the sentence. Id. at 320-21. The court rejected each of these claims on the merits, noting at the same time that "appellant did not request any charges, nor did he object to those given." Id. at 321.

In Perillo v. State, 758 S.W.2d 567, 577 (Tex. Crim. App. 1988), the court considered whether "the trial court erred in failing adequately to instruct the jury to consider any mitigating evidence bearing on its deliberations at the punishment stage. Appellant neither objected to the absence of such a charge, nor requested that a particular charge be given." (emphasis added). The court rejected the

claim on the merits, observing that the claim had been "steadfastly overruled" in the past.

In Motley v. State, 773 S.W.2d 283 (Tex. Crim. App. 1989), appellant argued that without a definition of "deliberately" in his case, special issue number one "preclude[d] the jury from considering mitigating circumstances." Id. at 286. The court rejected this claim on the merits. A review of the record in Motley reveals, however, that appellant neither raised objections to the charge, nor requested special instructions.[4] Similarly,

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[4] See Motley v. State, Case No. 69,452, R. at Vol. XIX, p. 124:

> THE COURT: It is the understanding of the Court that both of you have read [the charge on punishment] and there is no objection to the Court's charge; is that correct....?
>
> MR. CANNON (Defense Counsel): Yes, Your Honor. That's correct.

(continued...)

in Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), appellant argued that the statute was unconstitutional as applied because "there are no provisions for jury leniency if all the special issues are answered affirmatively" even if on the basis of the mitigating evidence the jury believes "the defendant does not 'deserve' a sentence of death." Id. at 729-30.[5] The Court of Criminal Appeals rejected Adams' claim on the merits, though once again, a review of the record indicates that Adams lodged no objection to the jury charge at trial.[6]

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[4](...continued)

[5] In fact, Penry raised the identical argument in state court. Penry v. State, 691 S.W.2d 636, 653-54 (Tex. Crim. App. 1985).

[6] See Adams v. State, Case No. 60,027, R. at Vol. V, p. 1428:

(continued...)

Finally, in Ex Parte Granviel,

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[6](...continued)

> THE COURT: Do you have any objections, Mr. White [Defense Counsel], to the [punishment] Charge?
>
> MR. WHITE: No, Your Honor.

See also Wilkerson v. State, 726 S.W.2d 542, 547-48 (Tex. Crim. App. 1989) (court rejects on merits claim that statute must clarify 'probability' to avoid constitutional infirmity, despite failure to object to the charge at trial, and despite state's assertion of waiver in its brief on appeal. Brief for Appellee at 29.)

Other rulings on unpreserved Penry claims are at best ambiguous, with the Court not clearly relying on a procedural default. For instance, in Williams v. State, 622 S.W.2d 116, 120 (Tex. Crim. App. 1981), the court considered appellant's unpreserved contention that "a charge on all mitigating evidence at the punishment phase of a capital murder trial is imperative if the jury is to give meaningful consideration to such evidence." The court overruled the objection, holding, "absent ... an objection or requested instruction, the trial court's failure to charge the jury as to the consideration of mitigating circumstances was not reversible error." In other words, the failure to preserve error did not waive the claim, but rather, merely made success on the merits more difficult.

appellant argued that the Texas statute "prevents the jury from considering a defendant's mental condition as a mitigating factor...." 561 S.W.2d at 516. The court rejected this claim on the merits, even though a review of the record indicates that Granviel made no request for special instructions and lodged no such objection to the statute at trial.[7]

Measured against this formidable array of cases is the one published decision of the Texas Court of Criminal Appeals suggesting that trial counsel's failure to request instructions at the sentencing

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[7] Granviel's only objection at trial was that the jury instructions at the punishment phase impermissibly shifted the burden to the defendant. See Ex Parte Granviel, Case No. 56267, Vol. 17, p. 3261. This objection would not be sufficient to preserve error relating to consideration of mitigating evidence, since an objection will not be considered on appeal if it varies from the objection lodged at trial. See Pyles v. State, 755 S.W.2d 98 (Tex. Crim. App. 1988). The Penry error, in other words, was unpreserved.

phase left the appellate court with "nothing for review" on appeal. See Fierro v. State, 706 S.W.2d 310, 318 (Tex. Crim. App. 1986). In Fierro, after stating that nothing was presented for review, the court nevertheless proceeded to review the merits of the claim. 706 S.W.2d at 318.

Thus the Texas Court's summary treatment of Mr. Selvage's Franklin/Penry claims in its unpublished adoption of the lower court's finding of procedural bar is clearly out of step with a long line of published precedent directly to the contrary. Selvage, then, in no way represents the "firmly established and regularly followed state practice" in Texas. James v. Kentucky, 466 U.S. at 348.[8]

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[8] Compare Dugger v. Adams, 489 U.S. ___, 109 S.Ct. ___, 103 L.Ed.2d 435, 445-46 n.6 (1989), suggesting that the sporadic failure of the Florida Supreme Court to apply a procedural bar to claims under Caldwell v. Mississippi, 472 U.S. 320 (1985), when measured against numerous (continued...)

At most, Selvage shows that in an insignificant minority of cases the settled rule is not applied. Therefore, Selvage is not supported by an adequate state ground, and the federal courts are obliged to review the merits of Mr. Selvage's Franklin/Penry claims.[9]

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[8](...continued)
consistent applications of a procedural bar on such claims, did not undermine the adequacy of the state ground. Here, by contrast, it is the procedural bar that the Texas Court applies only sporadically.

[9] In fact under state law, the decision in Selvage has no precedential value. See Tex.R.App.P. 90(i) ("Unpublished opinions shall not be cited as authority by counsel or by a court.") Thus, not only does Selvage contradict settled authority, it provides authority for nothing, including the law in Texas on procedural bar of Franklin/Penry claims. For this reason, other orders of the Texas Court of Criminal Appeals defaulting unpreserved Franklin/Penry claims have no bearing on the rule in Texas. Just as with Selvage, these unpublished orders have no precedential weight and cannot serve to put litigants on notice of the rule in Texas. See Williams v. Lynaugh, 837 F.2d 1294, 1296 (5th Cir. 1988) (noting state court's implied finding of waiver, and then rejecting under federal procedural default law because of novelty (continued...)

II. THE TEXAS LAW OF PROCEDURAL DEFAULT

As demonstrated above, the Texas Court of Criminal Appeals has repeatedly refused to apply a procedural bar to unpreserved Franklin/Penry claims. But even if the

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[9](...continued)
of Franklin/Penry claim); Bridge v. Lynaugh, 863 F.2d 370 (5th Cir. 1988) (Bridge III) (rejecting both Bridge II and Bridge I without comment), replacing Bridge v. Lynaugh, 860 F.2d 162 (5th Cir. 1988) (Bridge II), (rejecting state waiver as not an adequate and independent state ground) replacing Bridge v. Lynaugh, 856 F.2d 712 (5th Cir. 1988) (Bridge I) (same as Bridge II). Cf. Bell v. Lynaugh, 858 F.2d 978 (5th Cir. 1988) (upholding state's implied finding of waiver, without reference to Williams precedent); Hawkins v. Lynaugh, 862 F.2d 487 (5th Cir. 1988) (same); Ex Parte Landry , No. 16,800-05 (summarily adopting trial court's finding of waiver).

Yet even if these summary unpublished orders had any precedential weight, and they do not, the number of published Texas decisions expressly rejecting a finding of waiver of Franklin/Penry claims is still greater than the number of unpublished orders, such as Selvage, adopting lower court findings. Thus the ultimate conclusion is the same: there is no adequate state ground requiring deference by the federal courts.

Texas Court were to apply its procedural bar rule to such claims, the result would be the same: the Court would review unpreserved Franklin/Penry claims on the merits.

The Texas rule governing procedural bar has two dimensions. First, Texas has a "change in law" rule. This rule holds that if the claim asserts a right that had not been recognized by the Texas Court at the time of trial, then there is no waiver.[10] Second, Texas has a fundamental error doctrine excusing lack of a contemporaneous

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[10] The Texas rule is similar to the rule in Florida, Maryland, and Oklahoma. In each of these states, this rule has been applied to excuse trial waivers in cases where an intervening decision of this Court overturned prior state precedent. See, e.g., Hall v. State, 541 So.2d 1125, 1126 (Fla. 1989)(Hitchcock error not barred regardless of trial waiver); State v. Colvi, 548 A.2d 506, 518 (Md. 1988)(Mills v. Maryland error not waived, despite default at trial); Cartwright v. State, 708 P.2d 592, 594 (Okla. Crim. App. 1985)(Ake error is change of law justifying review on merits of unpreserved claim).

objection at trial.[11] This doctrine clearly encompasses Franklin/Penry claims, and excuses any failure to preserve the issue at trial. In Mr. Selvage's case, under both dimensions of the Texas rule, the finding of waiver does not comport with settled state authority.

A. Rights Not Recognized At the Time of Trial

1. The Rule

Texas law provides that "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized." Ex Parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984) (Campbell, J., concurring) (emphasis added). Under Texas law, rights are "not recognized" either because of

[11] The Texas rule is much like the rule in Oklahoma addressed by this Court in Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

novel developments in the law since trial[12], or because Texas law at the time of trial was settled against the claim and thus an objection would have been futile.[13] In either scenario, the Texas Court of Criminal Appeals will excuse any default at

[12] See, e.g., Mathews v. State, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989)(Upon "[f]inding a constitutional claim sufficiently 'novel', we hold there is no procedural default."); Ex parte Woods, 745 S.W.2d 21, 25 (Tex. Crim. App. 1988); Cook v. State, 741 S.W.2d 928, 944 (Tex. Crim. App. 1987)("[I]t has been said, '[W]here a defect of constitutional magnitude has not been established at the time of trial, the failure of counsel to object does not constitute waiver'", quoting Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984)(Campbell, J., concurring).

[13] See e.g., Ex parte Woods, 745 S.W.2d 21, 25 (Tex. Crim. App. 1988) (failure to object to psychiatric testimony on future dangerousness prior to Estelle v. Smith, 451 U.S. 454 (1981), does not bar claim in light of "apparent futility" of such an objection); Cook v. State, 741 S.W.2d 928, 944 (Tex. Crim. App. 1987) (same); Cuevas v. State, 641 S.W.2d 558, 563 (Tex. Crim. App. 1982) (no procedural default of Witherspoon-Adams claim since "at the time of this trial our case law made it abundantly clear that an objection ... would be futile").

trial and review the merits of the claim. The analysis is undertaken by the Texas Court on a case-by-case basis and depends on the state of Texas law at the time of the trial. This principle has operated in Texas without interruption for nearly two decades.

The Court of Criminal Appeals has applied this "right not recognized" rule in a variety of contexts. For example, the Texas Court applied the rule to a number of unpreserved Witherspoon claims. See Witherspoon v. Illinois, 391 U.S. 510 (1968). In Ocker v. State, 477 S.W.2d 288 (Tex. Crim. App. 1972) and Ex parte Martin, 479 S.W.2d 280 (Tex. Crim. App. 1972), counsel failed to preserve Witherspoon claims at trial. The Court nonetheless granted relief on the merits. As it later explained, "[n]o objection to a prospective juror was required" since the trials took place before Witherspoon was decided by

this Court and recognized by the Texas Court. Boulware v. State, 542 S.W.2d 677, 681-82 (Tex. Crim. App. 1976).

The rule was also applied to excuse the failure to preserve claims under this Court's decision in Adams v. Texas, 448 U.S. 38 (1980) (applying Witherspoon to strike down Texas capital jury oath). In Hartfield v. State, 645 S.W.2d 463 (Tex. Crim. App. 1980), for instance, appellant presented an unpreserved Adams claim. The state argued that Hartfield had waived his claim, but the Court of Criminal Appeals disagreed, concluding:

> ... at the time [venireman] Hlozk was excused, Sec. 12.31(b) was considered constitutional even to the extent that it allowed exclusion of prospective jurors on a broader ground than Witherspoon, supra, and consequently, there was no reason for appellant's counsel to strenuously attempt to preserve this error. We find that appellant did not waive this error.

645 S.W.2d at 441.

The Court applied the same rule in Cuevas v. State, 641 S.W 2d 558 (Tex. Crim. App. 1982). There the Texas Court excused trial counsel's pre-Adams failure to object properly to the exclusion of a juror. The Court reasoned that "at the time of this trial our case law made it abundantly clear that an objection to Sec. 12.31(b) exclusion on Witherspoon grounds would be futile." (emphasis added).[14]

The application of the "right not

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[14] The cases decided after Witherspoon and Adams illustrate the two ways in which the Texas Court will hold that a right is "not recognized": first, the Texas Court may not have "recognized" the claim because it was so novel as to never have been previously raised in Texas, as was the case with Ocker and Martin; and second, a claim may not have been "recognized" because it had been repeatedly raised and rejected by the Texas Court, as was the case with Hartfield and Cuevas. The critical inquiry then, is whether the claim had been recognized; the reason why it had not, either because of novelty or futility, is irrelevant. Texas applies a single test to every case: whether the Texas Court had previously recognized the claim. If not, then there is no waiver.

recognized" principle in Texas is not limited to capital cases. For instance, after this Court held in Burgett v. Texas, 389 U.S. 109 (1967) that prior uncounseled felony convictions could not be used to enhance the sentence in a subsequent case, the Court of Criminal Appeals reviewed a number of unpreserved Burgett claims on the merits. Since the trials occurred prior to the decision in Burgett, "no claim can be made that petitioner waived this contention by failing to object at trial." Ex parte Ropollo, 558 S.W.2d 869, 871 (Tex. Crim. App. 1977). See also Ex parte Hall, 546 S.W.2d 303, 304 (Tex. Crim. App. 1977); Ex parte Flores, 537 S.W.2d 458, 459 (Tex. Crim. App. 1976). Similarly, in Ex parte Cesarez, 508 S.W.2d 620, 622 (Tex. Crim. App. 1974), the Texas Court granted relief after the petitioner had received an enhanced sentence based on prior uncounseled misdemeanor convictions. The

trial took place two years before Burgett and five years before Argersinger v. Hamlin, 407 U.S. 25 (1972). "Consequently, counsel's failure to object upon a ground not yet established" did not waive the claim. Ex Parte Cesarez, supra, 622 (emphasis added).

The same rule has been applied in other non-capital contexts where this Court expressly overruled Texas' interpretation of applicable constitutional principles. For example, this Court's decision in Washington v. Texas, 388 U.S. 143 (1967) overruled Texas decisions concerning the compulsory process provisions of state law. In response, in Ex parte Turner, 542 S.W.2d 187, 189 (Tex. Crim. App. 1976), the Texas Court held that the failure to call a co-indictee as a witness, in obedience to the statute subsequently struck down by the Supreme Court, did not waive the compulsory process claim. In Turner, the Court

excused the default in state post-conviction proceedings, even though counsel had failed to raise the issue either at trial or on direct appeal. See Turner v. State, 471 S.W.2d 56 (Tex. Crim. App. 1971).

Likewise, in Leary v. United States, 395 U.S. 6 (1969), this Court held that convictions under the federal Marijuana Transfer Act violated the Fifth Amendment. The Texas Court of Criminal Appeals in Ex parte Taylor, 484 S.W.2d 748 (Tex. Crim. App. 1972), then granted relief to a petitioner who had failed to object at his trial in 1961 to an enhanced sentence based on a prior conviction under this Act. The Court reasoned that since it had not previously recognized the claim made available by Leary, he could not be faulted for failing to object. 484 S.W.2d at 752.

Finally, in 1984, the Court of Criminal Appeals unified these prior lines

of authority and restated their holdings as a single proposition: "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized". Ex parte Chambers, 688 S.W.2d 483, 486 (Tex. Crim. App. 1984)(Campbell, J., concurring).

In Chambers, petitioner went to trial before this Court's decision in Estelle v. Smith, 451 U.S. 454 (1981). At the time of Chambers' trial, the law in Texas was clear: state psychiatric interviews of capital defendants, followed by psychiatric testimony at trial on future dangerousness implicated neither the Fifth nor Sixth Amendment. See, e.g., Armstrong v. State, 502 S.W.2d 731, 735 (Tex. Crim. App. 1973); Livingston v. State, 542 S.W.2d 655, 661-62 (Tex. Crim. App. 1976), cert. denied,

431 U.S. 933 (1977).[15] Like Selvage, Chambers failed to raise any objection at trial to what would in his case become the Smith error.

After Chambers' trial, this Court in Smith rejected the prior Texas case law and held that a trial court violates both the Fifth and Sixth Amendment when it admits psychiatric testimony on future dangerousness based on interviews conducted without Miranda warnings to the defendant and without advance notice to defendant's counsel. 451 U.S. 454 (1981).[16]

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[15] See also Gholson v. State, 542 S.W.2d 395, 400 (Tex. Crim. App. 1976), cert. denied, 432 U.S. 911 (1977); Shippy v. State, 556 S.W.2d 246, 254 (Tex. Crim. App.), cert. denied, 434 U.S. 935 (1977); Von Byrd v. State, 563 S.W.2d 883, 897 (Tex. Crim. App. 1978); Muniz v. State, 573 S.W.2d 792, 795, n.5 (Tex. Crim. App 1978): Wilder v. State, 583 S.W.2d 349, 358-59 (Tex. Crim. App. 1979); Brandon v. State, 599 S.W.2d 567, 576 (Tex. Crim. App. 1979).

[16] In Field v. State, 627 S.W.2d 714 (Tex. Crim. App. 1982), Justice McCormick described the impact of Smith on Texas law:

(continued...)

In response to Smith, and despite trial counsel's failure to preserve the claim at trial, the Texas Court of Criminal Appeals in Chambers expressly held that the claim was not procedurally barred and granted full relief on the merits in post-conviction proceedings. Speaking for six members of the court, Justice Campbell reviewed the prior case law and summarized

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[16](...continued)

> Both holdings in Estelle v. Smith changed the law in Texas. This Court had for years rejected claims on these bases. Never before had it been held that a court-appointed mental health expert must warn a defendant of his right to remain silent and that evidence adduced in the psychiatric interview could be used against him. Never before had it been held that the defendant's attorney could receive notice before a psychiatric interview on the dangerousness issue could be held. In fact, in numerous cases this Court rejected the contentions that the proceedings used in Estelle violated a defendant's rights.

627 S.W.2d at 723-24 (McCormick, J., concurring). Justice McCormick's remarks in Field describe equally well the effect of the Penry decision on Texas law.

the Texas change in law rule. His articulation of the principle -- "a defendant has not waived his right to assert a constitutional violation by failing to object at trial if at the time of his trial the right had not been recognized" -- remains the rule today. Ex Parte Chambers, 688 S.W.2d at 486. See e.g., Mathews v. State, 768 S.W.2d 731, 733 (Tex. Crim. App. 1989); James v. State, 772 S.W.2d 84, 101 (Tex. Crim. App. 1989)("Chambers sets out the test which determines when a judicial decision, decided subsequent to a defendant's trial, relieves that defendant from making a contemporaneous objection"); Powell v. State, 742 S.W.2d 353, 66 (Tex. Crim. App. 1987) (the "right not recognized" rule is "part of our state procedural default rule dealing with preservation of constitutional error.") (Onion, C.J., dissenting on other grounds).

Applying this rule, the Texas Court has reviewed a number of other unpreserved Smith claims, including claims first raised on direct appeal, as well as those raised in state habeas petitions. See, e.g., Ex parte Demouchette, 633 S.W.2d 879, 881 (Tex. Crim. App. 1982) (reviewing merits of unpreserved Smith error); Powell v. State, 742 S.W.2d 353, 356-58 (Tex. Crim. App. 1987) (same); Cook v. State, 741 S.W.2d 928, 944 (Tex. Crim. App. 1987) (same); Ex parte Woods, 745 S.W.2d 21, 25 (Tex. Crim. App. 1988) (same).

The Chambers rule is a state rule, distinct from the federal procedural default doctrine set forth in Engle v. Isaac, 456 U.S. 107 (1982) and Reed v. Ross, 468 U.S. 1 (1984). In fact, contrary to Respondent's characterizations of state law in its response to Appellant's motion to certify a question, the Court in Chambers expressly considered and rejected

the Engle/Reed standard in favor of "this State's own procedural default rule." Ex parte Chambers, 688 S.W.2d at 486 (Campbell, J., concurring) (emphasis in original).

In Chambers the court reviewed Engle and Reed, and concluded:

> "While the teachings of Engle and Reed may be instructive, they are in no way binding on this Court. The rules enunciated in Engle v. Isaac and Reed v. Ross concern the exercise of federal habeas jurisdiction once a State procedural default has been shown. ... I do not interpret these cases as attempting to impose a federal procedural waiver standard to be used by State courts."

688 S.W.2d at 486 (Campbell, J., concurring) (emphasis added).[17]

Recently, the Texas Court repeated its

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[17] In Chambers, the Court of Criminal Appeals overruled Parker v. State, 649 S.W.2d 46 (Tex. Crim. App. 1983), which had attempted to change the state rule by adopting and applying the federal rule in Engle v. Isaac, 456 U.S. 107 (1982). Chambers, supra, at 486.

rejection of the federal standard. See Williams v. State, 773 S.W.2d 525 (Tex. Crim. App. 1988) (applying Chambers rule to unpreserved Batson claims). In the initial opinion in Williams, a plurality of the court attempted to change the state rule and apply the Engle/Reed standard. Id. at 530-35. A majority of the court disagreed with the plurality on this point. Id. at 539.

On rehearing, in a two paragraph per curiam opinion, seven members of the court upheld the result reached by the plurality, but expressly rejected the Engle/Reed standard, relying instead on "the reasons given in Mathews v. State...." Id. at 542. In Mathews, 768 S.W.2d at 733, the Texas Court had rejected the Engle/Reed analysis and reaffirmed Chambers (with its similar rejection of the federal rule) as the applicable rule in Texas. This reaffirmation of the state standard in

Williams converted a four judge plurality into a seven judge majority.[18]

In short, on several occasions a minority of the Texas Court of Criminal Appeals has attempted to alter the longstanding Texas rule that if the right had not been recognized at trial, for whatever reason, then there is no waiver of the claim. On every such occasion, the majority has rejected any change toward the federal standard, and re-affirmed the enduring precedent. Texas has its own

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[18] In fact, there are nine votes for the rule in Chambers, since the two dissenters in Mathews and Williams, Justices Miller and Teague, do not reject the rule in Chambers, but rather reject the majority's application of that rule to unpreserved Batson claims. See Mathews v. State, 768 S.W.2d at 733-36; Williams v. State, 773 S.W.2d at 542, Indeed, Justices Teague and Miller joined Justice Campbell in his original concurrence in Chambers. 688 S.W.2d at 486. There is, in other words, unanimous agreement on the Texas Court of Criminal Appeals that the procedural default rule in Texas is properly stated in Chambers, and not in Parker's apparent adoption of Engle/Reed.

change of law doctrine, and that doctrine makes one inquiry: whether the Texas Court has recognized the claim. If not, there is no waiver.

2. The "Right Not Recognized" Rule As Applied to Franklin/Penry Claims

If ever there were a right not previously recognized in Texas, it is the right announced by this Court in Penry v. Lynaugh, 106 L.Ed.2d 256 (1989). In an unbroken line of cases prior to Penry, the Texas Court of Criminal Appeals had rejected every variant of the claim ultimately accepted by this Court. Litigants had argued that the statute precluded the consideration of mitigating circumstances, that the statute required a definition of critical terms to guide the jury in its consideration of mitigating circumstances, and that the statute as applied and on its face was too vague to

allow for the consideration of mitigating circumstances.[19] Without exception, the

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[19] Penry's attorney also raised these claims in several ways. See, Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d 256, 273 (1989) ("Defense counsel raised a number of objections to the proposed charge to the jury.... [H]e objected that the charge failed to define the term 'deliberately.'... [H]e objected that the charge failed to define the terms 'probability,' 'criminal acts of violence,' and 'continuing threat to society.' Defense counsel also objected to the charge because it failed to 'authorize a discretionary grant of mercy based upon the existence of mitigating circumstances' and because it 'fail[ed] to require as a condition to the assessment of the death penalty that the State show beyond a reasonable doubt that any aggravating circumstances found to exist outweigh any mitigating circumstances.' In addition, the charge failed to instruct the jury that it may take into consideration all of the evidence whether aggravating or mitigating in nature which was submitted in the full trial of the case." (citations omitted)).

As noted in the cases discussed in text, defense counsel over time made each of these objections, as well as other similar objections. Though the form of the objection varied, the Texas Court's rote response did not. See, e.g., Cordova v. State, 733 S.W.2d 175, 189-90 (Tex. Crim. App. 1987)(Although the issue has been presented in many different forms, this Court has consistently rejected the

(continued...)

Texas Court rejected the claim.[20]

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[19](...continued)
contention that the Texas statutory capital murder scheme ... require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations.")

The Texas Court repeatedly invoked this Court's decisions in Jurek v. Texas, 428 U.S. 262 (1976) and Lockett v. Ohio 438 U.S. 586 (1978), as well as its own decisions rejecting these claims based on the same federal authority, see e.g., Quinones v. State, [[cite]] (rejecting several Penry-type claims based on, inter alia, this Court's decisions in Jurek and Lockett). See, Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984)(relying on Jurek, court rejects merits of appellant's unpreserved claim that statute as applied violated the eighth amendment "because it contains no provisions for directing and instructing the jury's consideration of mitigating circumstances at the punishment phase of the trial"); Johnson v. State, 691 S.W.2d 619, 625-26 (Tex. Crim. App. 1984)(rejecting on merits appellant's unpreserved claim that Texas statute as applied in his case violated Lockett v. Ohio because it failed to "clearly guide the jury in understanding mitigating circumstances ... and [inform the jury of the] option to recommend life imprisonment even though aggravating circumstances are found.")

[20] In fact, no court in the entire country had accepted the claim prior to Penry. The Fifth Circuit, as well as every federal district court to address the (continued...)

By the time of Mr. Selvage's trial, the question was already settled in Texas. In Ex Parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978), for instance, the petitioner argued that the statute "as applied is unconstitutional because it prevents the jury from considering a defendant's mental condition as a mitigating factor in relation to the two or possibly three statutory special issues to be submitted to the jury at the penalty stage of a capital murder trial." Id. at 516. The Texas Court rejected this claim, concluding that "the jury in answering the special issues may properly consider all the evidence adduced during both the guilt and punishment phases of the trial." Id.

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[20](...continued)
question, had rejected it, as had the only other state court to consider the claim. People v. Wagner, 752 P.2d 1136 (Ore. 1988) (upholding the Oregon statute against Penry/Franklin challenges, relying in part on Texas authority).

Similarly in Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), rev'd on other grounds sub. nom. Adams v. Texas, 448 U.S. 38 (1980), the appellant "argue[d] that [mitigating] evidence is of no avail to the defendant if the jury is convinced by the evidence . . . that the punishment issues should be answered affirmatively," because "the punishment of death is [then] mandatory even though the jury, on the basis of the mitigating evidence, may believe that death is inappropriate." 577 S.W.2d at 729. This claim was rejected.[21]

Finally, in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980), the appellant argued that "an explanatory charge is necessary to keep the jury from disregarding the [mitigating] evidence properly before it." Id. at 947. Again, the Court soundly rejected this claim. It

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[21] Furthermore, as noted in Section I, Adams was an unpreserved claim.

held:

> The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required.

(emphasis added). Id.[22]

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[22] After Mr. Selvage's trial, the Texas court continued its resistance to the Penry claim. See, e.g., Stewart v. State, 686 S.W.2d 118, 121 (Tex.Cr.App. 1984) ("[f]urther, we held in Quinones v. State, supra, that no jury charge regarding evidence of any mitigating circumstances was necessary since the questions prescribed under Article 37.071 clearly allow the jury to grasp the logical relevance of mitigating evidence"); Cordova v. State, 733 S.W.2d 175, 189-190 (Tex. Cr. App. 1987) ("[u]nder our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues.... Although the issue has been presented in many different forms, this Court has consistently rejected the contention that the Texas statutory capital murder scheme and the Fifth, Eighth, and Fourteenth Amendments to the Federal Constitution require that the trial court give an affirmative instruction that the jury must consider or apply mitigating evidence in their deliberations"); Burns v. State, 761 S.W.2d 353, 358 (Tex. Cr. App. 1988) (Quinones itself teaches that '[t]he jury can readily grasp the logical relevance of mitigating evidence to the [special]

(continued...)

Like Adams v. Texas and Estelle v. Smith, Penry v. Lynaugh rejected an unbroken line of state authority. This Court held in Penry that the Texas capital sentencing statute violates the Eighth Amendment by precluding the jury from considering and giving effect to certain types of mitigating evidence. Just as it was in response to Adams and Smith, the Texas Court is now bound by its well-

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[22](...continued)
presume the jury will understand the significance of evidence proffered in mitigating, and will give such evidence mitigating weight at its discretion, in resolving special issues") (footnote omitted); James v. State, 772 S.W.2d 84, 102 (Tex. Crim. App. 1989) ([R]egardless of the evidence presented [in mitigation], appellant was not entitled to the requested instruction. This Court has repeatedly held that, although a capital murder defendant has a right to have certain evidence considered in mitigation of punishment, he is not entitled to jury instructions informing the jury that certain evidence may be considered or how it may be applied.") (emphasis added).

A more complete list of Texas cases rejecting the Penry claim appears in the Appendix to this Brief.

settled "right not recognized" doctrine to review the merits of unpreserved Penry claims.[23] There is no bar, therefore, to federal court review of Mr. Selvage's Penry claim on the merits.

B. Fundamental Error

Mr. Selvage claims that the Texas capital sentencing scheme operated in his case to preclude the jury from giving appropriate consideration to evidence that was presented or available for presentation at the sentencing phase of his trial. His claim thus arises from the bedrock Eighth Amendment principle that the sentencer in a capital trial may not be precluded "from considering any aspect of a defendant's character and record or any circumstances of his offense as an independent mitigating

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[23] As noted previously, this precise issue is presently before the Texas Court in Amicus' case.

factor" in support of a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 607 (1978).

In Texas, a failure to object to the jury charge does not waive fundamental error of this nature. E.g., Nichols v. State, 754 S.W.2d 185, 198 (Tex. Crim. App. 1988); Garrett v. State, 682 S.W.2d 301, 307 (Tex. Crim. App. 1984). Error is fundamental if it "create[s] such harm that it deprives appellant a fair and impartial trial." Nichols, at 198.

There can be no doubt that a Penry error is fundamental. By definition, a Penry violation means that the accused has been deprived of his constitutional guarantee that the attorney be allowed to present, and the sentencer be required to consider and credit, relevant mitigating evidence. Moreover, as Penry notes, the Texas scheme provides the jury with a ready vehicle for crediting the aggravating edge

of "double-edged sword" evidence, but deprives them of a corresponding means to consider and credit the mitigating edge. Under this scenario, it cannot be suggested that the trial is "fair" or "impartial". Indeed, it is the essence of a Penry violation that the sentencing deliberation was fundamentally unfair. In Texas, therefore, the violation is fundamental, and cannot be waived for failure to object at trial.[24] Mr. Selvage's Franklin/Penry

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[24] The Court of Criminal Appeals implicitly acknowledged as much when it reviewed the merits of an unpreserved Penry claim for fundamental error in Sosa v. State, 769 S.W.2d 909, 916 (Tex. Crim. App. 1989). Under the pre-Penry view of the law, the court found no fundamental error. Following Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App. 1980), the court held that "no jury charge regarding evidence of any mitigating circumstances was necessary since [the statute] clearly allowed the jury to grasp the logical relevance of mitigating evidence." This analysis is simply wrong under Penry. Therefore, if Sosa states the test for fundamental error based on a Penry violation, and since Sosa would be decided differently after Penry, then Penry error is fundamental.

claims are not procedurally barred.

III. THE STATE PROCEDURAL RULE IS INTERWOVEN WITH FEDERAL LAW AND AS SUCH CANNOT BE AN INDEPENDENT STATE GROUND FOR THE DECISION IN THIS CASE

As noted in Section II, the Texas procedural bar rule has two dimensions: first, the Court of Criminal Appeals will review unpreserved challenges to the jury charge only if the claim presents a question of "fundamental error"; second, the Court will review any unpreserved claim if the basis for that claim had not been recognized in Texas at the time of trial. As demonstrated below, since both aspects of the Texas rule depend integrally on the operation of federal constitutional principles, the rule cannot be an independent state ground for the decision. Consequently, absent an independent ground, there is no barrier to the consideration in federal court of the merits of Mr.

Selvage's federal claim.

A. The State Ground Must Be Independent of Federal Constitutional Principles

Absent a showing of cause and prejudice, the federal courts will not review judgments of state courts which rest upon independent state grounds. See Wainwright v. Sykes, 433 U.S. 72 (1977). This rule follows from the principle that federal courts cannot issue advisory opinions; if the state court judgment would stand independent of the ruling by a federal court on the federal claim, then the opinion by the federal court would be merely advisory. See Herb v. Pitcairn, 324 U.S. 117, 126 (1945).

But "when resolution of the state procedural law question depends on a federal constitutional ruling," Ake v. Oklahoma, 470 U.S. 68, 75 (1985), the federal court need not defer to the state

decision. In such a case, the state court's decision on "the non-Federal ground is so interwoven with the other [federal ground] as not to be an independent matter." Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917). Thus, where the state court's holding "is not of sufficient breadth to sustain the judgment without any decision of the other [federal issue]," federal courts will not defer to the state court's procedural holding. Id. "In such a case, the federal-law holding is integral to the state court's disposition of the matter, and our ruling on the issue is in no respect advisory." Ake v. Oklahoma, 470 U.S. 68, 75 (1985).

In Ake, this Court refused to honor the finding of waiver by the state court because the procedural rule in Oklahoma depended in part upon a resolution of the federal constitutional claim. Id. In

particular, the procedural bar rule in Oklahoma allowed litigants to raise unpreserved claims if the Oklahoma Court of Criminal Appeals deemed the error "fundamental". "Fundamental" error had been defined in Oklahoma to include federal constitutional error. Id.

As shown below, both aspects of the Texas procedural bar rule depend upon a determination of the underlying federal constitutional claim. When the Texas Court applies its "fundamental error" analysis, it must determine whether the claim presents, inter alia, a violation of the federal constitution. See Nichols v. State, 754 S.W.2d 185 (Tex. Crim. App. 1988). If there is no violation, the error is not "fundamental" and the claim is waived. Furthermore, applying its Chambers analysis, the Texas Court must determine whether the intervening decision creates a right it had not previously recognized.

Thus, in Texas, as in Oklahoma, where the underlying claim is of federal constitutional dimension, a "resolution of the state procedural law question depends on a federal constitutional ruling," Ake v. Oklahoma, 470 U.S. at 75, and thus "is not independent of federal law." Id.

B. The Texas Fundamental Error Rule Depends on Federal Law

The Texas Court of Criminal Appeals has repeatedly held that the fundamental error aspect of its procedural bar rule depends entirely upon the merits of the underlying federal constitutional claim. The most prominent illustration of this appears in Nichols v. State, 754 S.W.2d 185 (Tex. Crim. App. 1988). In Nichols, a capital case, the court considered the following challenge:

> [A]ppellant contends that the trial court fundamentally erred by failing to charge the jury at punishment that they could not rely on the law of parties in

> answering the special issues.... Appellant concedes, however, that he failed to request or object to the absence of such a charge. The failure to object to the charge waives all but fundamental error.

Id. at 198. That is, because appellant had not objected to the charge, only "fundamental error" was before the Court.

The Court then proceeded to review appellant's allegation on the merits of the federal claim, ultimately rejecting it. Applying Enmund v. Florida, 458 U.S. 782 (1982), the Texas Court held that "the failure to give such a charge, absent a request or objection, does not constitute fundamental error."

The syllogism in Nichols, then, is as follows: all claims other than those deemed fundamental error are waived for failure to object to the charge. Appellant's claim, based on a review of the merits of the federal allegation, was judged not to amount to fundamental error.

Therefore, his claim was waived. The operation of the procedural bar rule, in other words, depended entirely on the merits of the federal claim.

Nichols is no aberration; the court of Criminal Appeals has ruled in precisely the same fashion in the context of unpreserved Penry claims. In Sosa v. State, 769 S.W.2d 909 (Tex. Crim. App. 1989), the Court of Criminal Appeals considered whether "fundamental error occurred when the trial court failed to instruct the jury during the punishment phase of the trial that they could consider mitigating circumstances in their deliberations on the special issues. Appellant did not request such an instruction at trial." Under the long-standing rule in Texas, the failure to object to the charge waived all but fundamental error. See e.g., Garrett v. State, 682 S.W.2d at 307. Yet the court

in Sosa, just as in Nichols, reviewed the merits of the unpreserved Penry claim, erroneously rejecting it on the strength of its pre-Penry rulings interpreting the Eighth Amendment. Based on this review, the court found no fundamental error. Thus, as in Nichols, since the merits of the claim presented no error, and since only fundamental error was before the Court, Sosa's claim was waived.[25] Once again, the procedural rule depended entirely on the merits of the underlying

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[25] Sosa on its face appears to be yet another example of an unpreserved Penry claim reviewed on the merits by the Court of Criminal Appeals. Under the analysis offered here, however, the case is a procedural ruling which depends on the merits. Amicus concedes that Sosa cannot be both a merits and a procedural holding and hence has not included it in the list of cases reviewing unpreserved Penry claims on the merits. Yet manifestly, it is one or the other; either it is a merits ruling, which underscores the fact that there is no procedural bar to Franklin/Penry claims in Texas, or it is a procedural ruling which depends on the merits, which demonstrates that the Texas rule is not an independent state ground.

federal constitutional claim.[26]

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[26] In its pleadings before the Court of Criminal Appeals in Amicus' case, Respondent expressly conceded that the Texas fundamental error analysis is dependent on the merits of the underlying federal claim. See Ex parte Earvin, No. 70,886, Brief of Amicus Curiae Texas Attorney General, at 15. ("The standard for fundamental error is essentially the same as the federal due process standard...." [citing Ex parte Maldonado, and Cupp v. Naughten.]) More significantly, respondent acknowledges that the analysis of whether the error in Amicus' case was fundamental depends upon the merits of the underlying Penry claim. Brief of Amicus Curiae, at 16-26:

> In Earvin's case, the alleged error cannot be characterized as fundamental. As discussed more thoroughly below, the special sentencing issues directed the jury to consider Earvin's evidence ... and the issues themselves provided the jury with a vehicle for giving mitigating effect to such evidence. Thus, in Earvin's case, the special issues were the substantial equivalent of an instruction directing the jury to consider these factors in mitigation of punishment.

Id. at 16-17. The ensuing merits analysis, which occupies nearly half the brief, attempts to show that "Earvin's case is much more akin to Franklin v. Lynaugh, 108 S.Ct. 2320 (1988), than it is to Penry." (continued...)

To the same effect is Ex parte Coleman, 599 S.W.2d 306 (Tex. Crim. App. 1978). In Coleman, petitioner alleged for the first time on collateral review that the charge to the jury violated federal due process by improperly instructing on an offense other than the one charged. Once again, since nothing was preserved, nothing save fundamental error was before the Court. Yet, as in Nichols and Sosa, the waiver analysis depended entirely on the merits of the federal constitutional claim, which the Court reviewed under Cupp v. Naughten, 414 U.S. 141 (1973) and Henderson v. Kibbe, 431 U.S. 145 (1977).[27]

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[26](...continued)
Id. at 18. Respondent is mistaken in its view of the merits in Amicus' case, but not in its conclusion that the fundamental error analysis depends on the merits of the underlying constitutional claim.

[27] In 1985, the Texas Court decided Almanza v. State, 686 S.W.2d 157, 171-72 (Tex. Crim. App. 1985), which clarified the test for measuring the harm suffered by a (continued...)

C. The Chambers "Right Not Recognized" Rule

As discussed above, following cases such as Adams v. Texas, Estelle v. Smith, and now, Penry v. Lynaugh, where this Court held that the Texas Court of Criminal Appeals has misconstrued federal law, Texas law requires that failures to object at trial be excused. The Texas Court cannot apply its own state rule without assessing whether the unpreserved claim asserts a right recognized in federal court although not previously acknowledged in the state courts. In every instance in which the

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[27](...continued)
particular error. Though Coleman was decided prior to the decision in Almanza, Coleman's dependence on federal principles for the purposes of the procedural bar rule was expressly reaffirmed in the post-Almanza decision, Ex parte Maldonado, 688 S.W.2d 114, 116 n.2 (Tex. Crim. App. 1985)("[T]he reasoning in Coleman, along with its embracing the test provided by the Supreme Court in Cupp v. Naughten, 414 U.S. 141, 147 (1973), is the essence of the rationale of Almanza.")

Texas Court has applied this rule, it has first determined whether there exists a federal decision that alters the prior Texas law in some way. See Ex Parte Chambers, Cuevas v. State, Ex Parte Martin,

Thus "the federal-law holding is integral to the state court's disposition of the matter." Ake v. Oklahoma, 470 U.S. 68, 75 (1985). Texas' change in law procedural rule directly "depends on a federal constitutional ruling." Ake v. Oklahoma, supra at 75. Thus where, as here, the procedural bar ruling "is so interwoven with the other [federal ground]," it is not "an independent matter" requiring deference by the federal courts. Enterprise Irrigation District v. Farmers Mutual Canal Co., supra.

CONCLUSION

For the foregoing reasons, there is no procedural bar to federal court review on the merits of Mr. Selvage's Franklin/Penry claims.

Respectfully submitted,

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APPENDIX

TEXAS DECISIONS ON FRANKLIN/PENRY CLAIMS

I. Statutory Preclusion of Consideration of Mitigating Evidence

Havard v. State, No.69,581(June 14, 1989)
Motley v. State, 772 S.W.2d 283 (1989)
Sosa v. State, 769 S.W.2d 916 (1989)
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